PUBLIC FINANCE BHD.

v.

S. RAMASAMY K.M.S. CHOCKALINGAM CHETTIAR

HIGH COURT MALAYA, ALOR SETAR
KC VOHRAH J
[CIVIL SUIT NO. 23-89-87]
24 JUNE 1990

CIVIL PROCEDURE: *Summary judgment - Leave to join third party - Interpretation of provisions in agreement - Any issues of fact or law - Sham defence - Abuse of power of Court - Whether inordinate delay - Whether plaintiff precluded from claim.*

The parties had entered into an agreement whereby the plaintiff would advance monies to a developer, N, for the purchase by the defendant of certain buildings; the agreement provided that if the defendant defaults in payments of interest due on the progress payments released to Natcom the total of all amounts released and interest thereof will be payable on demand. The building was not completed and N was placed under receivership. The plaintiffs' claim is for the amounts released to N, interest and costs and for striking out of the defence under O. 18 r. 19(1)(a) and (d) of Rules of the High Court 1980. The defendant filed an application for leave to joint the receivers and managers of N as third party to the proceedings.

Held:

[1] The defendant's contention that they should have been notified of each progress payment is not proved as the agreement does not contain any provision which requires the plaintiffs, when making the payments to N, to notify the defendant.

[2] There is also no triable issue in relation to the notification required to be given by the plaintiff as clause 6 of the agreement gives additional rights to the plaintiffs to call back the loan without relying on any of the clauses on relating to the defendant's default in the payment of instalments.

[3] Once default was made in the interest payments clause 7(1)(a) of the agreement provides that all monies owing under the agreement become immediately payable.

[4] The Court also does not accept the defendant's claim that the plaintiff should not have released the monies to N on the basis that the loan was for the benefit of the defendant as clause 1 and 2 read together gives the plaintiff the sole discretion in relation to the time and method of payments.

[5] The facts do not show that there was inordinate delay on the part of the plaintiffs in making the application - see Raja Azlan Shah (as he then was), in *Malayan Banking Bhd. v. Gan Kong Yan*.

[6] Having gone through the arguments, the pleadings, the affidavits and the documents attached, there is no question of fact or law which ought to be tried or argued in this case. The defence is a sham defence which has been put in solely to play for time and is an abuse of the process of the Court.

[7] The plaintiff ought not to be precluded from summary judgment even assuming there is a lapse of 14 months in seeking the application for summary judgment as it would only mean unnecessary prolongment of the case resulting in a waste of time.

[Defence struck out; leave to plaintiff to sign final judgment and for costs.]

Cases referred to:
Hoo See Sen & Anor. v. Public Bank Bhd. & Anor. [1988] 1 CLJ (Rep) 125
Malayan Banking v. Gan Kong Yan [1972] 1 MLJ 32
Cross v. Earl Have 62 LJ Ch. 342
Controller General of Inland Revenue Malaysia v. Weng Lok Mining Co. Ltd. [1969] 2 MLJ 100

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19(1)(a), (d)

For the defendant - S.P. Annamalai; M/s. Annamalai & Co.
For the plaintiff - Ismail Alabas; M/s. Jayadeva & Kamal

JUDGMENT

KC Vohrah J:

There is no dispute that the plaintiffs and defendant entered into a loan agreement dated 27 September 1985. It was for the purpose of purchasing by the defendant of 4 units of shoplots in a building. The building was being developed by Natcom Development Sdn. Bhd. (Natcom). The loan amount was RM280,000 and it was agreed that the plaintiff would advance progress payments to Natcom. It was also agreed that the loan advanced progressively was to be repayable with interest at the rate of 14% per annum on monthly rests and the defendant undertook to pay interest monthly on all principal sums released to Natcom until the full loan becomes released on completion of the said building whereupon the whole principal sum of RM280,000 which becomes released and in interest thereon will be repayable by 180 monthly instalments over a period of 15 years.

It is also not disputed that there is a clause in the agreement to the effect that if the defendant defaults in payment of interest due on the progress payments released to Natcom the total of all amounts released and interest thereof will be payable on demand.

It is not disputed that the building has not been completed and Natcom is under receivership. Again it is not disputed that various sums under the loan agreement were released to Natcom and that by 9 February 1987 RM186,962.54 had been released by the plaintiffs to Natcom and that the defendant had not paid interest as agreed and that on the same date a notice demanding the principal sum and interest thereon was sent to the defendant. The defendant says he responded to that notice.

The plaintiffs' claim is for RM186,962.54, interest thereon and costs. Their application is for the defence to be struck out and for leave to enter final judgment. The defendant filed an application for leave to file a third party notice; to appoint the receivers and managers of Natcom as third party to the proceedings.

The defence raised is in connection with Natcom's failure or neglect to comply with the obligations under Natcom's four agreements with the defendant to complete the building within 24 months of 23 March 1985, the date of the agreements. Under the terms of the four agreements Natcom would have to compensate and indemnify the defendant. The defendant says that because of the breach of agreements by Natcom the defendant could not service his loan agreement with the plaintiffs on the interest. The defendant also says that the plaintiffs had released the loan amounts directly to Natcom without the defendant's knowledge and that they owed a duty to ensure that the building works were properly and progressively carried out by Natcom. The main defence is that the claim of the plaintiffs is premature and the defendant is not obliged to repay the debts until completion of the said building and that the plaintiff can only claim for arrears of interest remaining unpaid and not for the sums so far released by the plaintiffs to Natcom.

The application by the plaintiffs is under O. 18 r. 19(1)(a) and (d).

Clause 1 of the said agreement states:

> In consideration of the loan of the sum of Malaysian Ringgit Two Hundred And Eight Thousand Only (RM280,000) (which said sum is hereinafter referred to as "the principal sum") lent to or advanced for the benefit of the borrower by the lender to the company in the manner and at the times as set out in the second schedule hereto annexed the borrower shall pay the principal sum and all interest thereon in the manner and at the times as hereinafter provided in the first schedule hereto annexed, or in such other manner any by such other amount as may be determined in accordance with clause 5 hereof until the whole of such principal sum and all interests shall be fully paid and satisfied.

Clause 5 is not relevant for the purpose of this case. As for the first schedule referred to in clause 1, in so far as it relates to interest payments para. B(i) reads:

> The interest upon any part of the principal sum disbursed calculated monthly on a daily basis during the period of progressive releases (as set out in the second schedule hereto) shall be paid by the borrower to the lender every subsequent month before the 7th day of each month commencing on the 1st day of the month following the date of disbursement of each and every progressive releases.

Under clause 7(i)(a) it is covenanted as follows:

> In the event that the borrower ...
>
> (a) shall make default in payment of any one or more of the instalments or any interest thereon or other sums or moneys (whether principal or interest) herein agreed or covenanted by the borrower to be paid.
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> ...
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> ...
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> then and in any of such cases the principal sum and any interest thereon and all other sums or moneys (whether principal or interest) for the time being owing under this agreement shall immediately become payable by the borrower to the lender and the lender shall forthwith become entitled to recover the same with interest thereon at the prescribed rate and to exercise the right and power upon default herein this agreement and by law provided. Any demand for payment of the moneys owing under this agreement may be made by a notice in writing requiring payment within seven (7) days from the date thereof.

On his own admission the defendant did default in his payment of the interest due on the progressive advancements of the loan by the plaintiffs. The plaintiffs through their solicitors, and this is not disputed, gave written notice requesting payment in full of the sum of RM186,962.54 which had been progressively released. Have the plaintiffs to notify the defendant everytime progress payment are released? There is nowhere in the agreement any provision which requires the plaintiffs when making release of the loan amounts to Natcom to notify the defendant. There is therefore no triable issue on this matter as claimed by the defendant.

The defendant says the plaintiffs should have given 3 months notice before the full amount advanced and interest therein can be claimed and he refers to clause 6 of the agreement which reads:

> 6. It is hereby expressly declared that notwithstanding any provision for payment by instalments hereinbefore contained the lender may at any time give to the borrower three (3) months previous notice in writing without assigning any reason thereto requiring payment of the whole of the moneys then owing to the lender under this agreement and the borrower will

> pay such moneys forthwith upon the expiration of such notice and such notice shall be in writing signed by any duly authorised officer of the lender and such notice shall be deemed to have been sufficiently served on the borrower if it is left at the borrower's usual or last known place of residence within Malaysia or at any one of the borrower's usual or last known places of business or sent by registered letter to either of such addresses and in the last mentioned case service shall be deemed to be made at the time when the registered letter would in the ordinary course be delivered.

I am surprised that the defendant has relied on the above clause as clearly the clause gives an additional right to the plaintiffs to call back the loan without relying on any of the clauses relating to the defendant's default in the payment of instalments. Clause 6 does not give rise to a triable issue. There is no triable issue as to whether the plaintiff's suit is premature and misconceived.

As regards plaintiffs' claim that clause 7 comes into force only when the full principal sum has been disbursed in full, citing para. B(ii) of the first schedule, again I am surprised he has relied on that provision as clearly that provision applies in regard to the terms for its repayment after the principal sum has been disbursed in full. In the situation under consideration which concerns interest payable, para. B(i) of the same schedule, as set out earlier in this judgment, is the appropriate provision and the plaintiffs are clearly relying on that provision.

Default having been made in the interest payments, the plaintiffs are resorting to clause 7(1)(a) which was also set out earlier. Here again I see no triable issue.

The defendant also claims that the plaintiffs should not have released the moneys to Natcom as the building was abandoned because under clause 1 the loan was for "the benefit" of the defendant. He relies on the case of *Hoo See Sen & Anor. v. Public Bank Bhd. & Anor.* [1988] 1 CLJ (Rep) 125 on the principle that a loan being expressed as "for the "benefit of the borrower" cannot be released without the authority of the borrower. With respect resort is being made out of context to the expression "to the benefit" in clause 1 to bolster the argument. Contextually clause 2 of the agreement should be taken into account. It provides that:

> (the) lender may at its sole discretion and wherever applicable pay the whole or any part of the principal sum to the builder, developer ... and all advances and payments to such aforesaid person or persons shall for all purposes whatsoever be deemed to be and form part of the moneys owing under this agreement ...

There is nothing in the agreement by the parties that the plaintiffs must give notice to the defendant or consult him before making disbursements. In fact clause 1 of the agreement (set out earlier) and the second schedule to the agreement together regulate the time for disbursements.

The defendant cannot deny that in the agreements made between Natcom and him, s. 4.03 appearing therein provides that every notice requesting for payment shall be supported by the requisite certificate of the developer's architect or engineer and shall be accepted by the purchaser without objection or enquiry as conclusive of the fact that the works therein referred to have been completed.

In that agreement s. 9.01 para. 2 provides:

> The purchaser hereby agrees and authorises the financier to release on behalf of the purchaser the loan money direct to the developer by such instalments and at such times as the financier may in its absolute discretion think fit ...

With respect reliance on the case cited is misconceived; in the case cited the document that was looked into was a deed of assignment not a loan agreement as the case here and in that deed, "There is not a single clause which deals specifically with the disbursement of the loan." (per Salleh Abas LP at p. 127 of case).

I next move to the complaint that there was inordinate delay in making the application. The defendant complains that the application by the plaintiff to strike out the defence was filed 14 months after the defence was filed; there is therefore inordinate delay and he relies on *Malayan Banking v. Gan Kong Yan* [1972] 1 MLJ 32 saying that Raja Azlan Shah J (as he then was) considered 7 days delay after close of pleadings as delay in making the application. With respect that was not what was stated. The case *Cross v. Earl Have* 62 LJ Ch. 342 was cited by His Lordship as showing that an application to strike out a defence or any part thereof should always be made promptly and as a rule, this should be before the close of pleadings. His Lordship held that although the application was made more than 7 days after the close of pleadings, on the facts in the case and in particular the fact that the application was made after the filing of particulars by the defendant, it was made reasonably promptly, since in any event the case had not yet been set down for trial.

In respect of the present case the affidavit of Yang Adnan Shafie, the manager of the plaintiffs, shows clearly that the defendant had meetings on 15 July 1987 and 18 July 1987 when he made proposals for an amicable settlement of the case. The affidavits of both Yang Adnan Shafie and the defendant indeed show that there were negotiations to settle the case and clearly the application to strike out the defence was made after the negotiations failed. In any event the case has not yet been set down for hearing and I cannot see inordinate delay having been made out.

Having gone through the arguments, the pleadings, the affidavits and the document attached thereto I fail to see any question of fact or law which ought to be tried or argued in this case. The defence is a sham defence; the defence has been put in solely to play for time and is an abuse of the process of the Court. The plaintiff ought not to be precluded from summary judgment even assuming there is a lapse of 14 months in seeking the application for summary judgment as it would only mean unnecessary prolongment of the case resulting in a waste of time (see *Controller General of Inland Revenue Malaysia v. Weng Lok Mining Co. Ltd.* [1969] MLJ 2 at p. 100.) I therefore affirm the order I made in chambers striking out the defence, for leave to the plaintiffs to sign final judgment and for costs.

As for the application of the defendant to issue a third party notice on the receivers and managers of Natcom - to make them third parties to the proceedings, in view of the order I am giving striking out the defence and for leave to the plaintiffs to sign final judgment, the question of issuing a third party notice does not arise and I affirm my decision in chambers dismissing the defendant's application with costs.

Also found at [1990] 2 CLJ 431